Lau Yuen Kheong & Ors v Masterwheel Engineering Supplies

HIGH COURT (SEREMBAN) — CIVIL APPEAL NO 12–75 OF 2002
LOW HOP BING J
8 AUGUST 2005

Civil Procedure — Writ of seizure and sale — Powers of court to set aside writ on ground of irregularity — Whether typographical in application of writ fatal — Whether writ legally executed

This was an appeal by the appellants-claimants ('the claimants') against the decision of the learned sessions court judge ('the trial judge') who had dismissed with costs the claimants' claim. The respondent ('judgment creditor') had obtained summary judgment under O 26A of the Subordinate Courts Rules 1980 ('SCR 1980') against the defendant ('judgment debtor'). The judgment creditor caused a writ of seizure and sale ('the WSS') to be issued against the judgment debtor to seize the goods in the judgment debtor's premises. The claimants claimed to be owners of all the goods in the judgment debtor's premises. The WSS was executed by the bailiff of the Seremban sessions court ('the bailiff') after obtaining an order of the court to use reasonable force to enter the judgment debtor's premises.

Held, dismissing the appeal with costs:

(1) A perusal of the WSS led the court to the finding that the judgment debtor had made an application to set aside the WSS on the ground that the impugned judgment was dated 16 January 2002 when the judgment was actually obtained by the judgment creditor on 17 May 2002. At the hearing of that application, the sessions court had ruled that the error in the date was typographical and so the judgment creditor was allowed to amend the date to 17 May 2002 to reflect the true position as that was the date the judgment was obtained by the judgment creditor (see para 33).

(2) The judgment debtor's director had made every effort for the sole purpose of evading the satisfaction of the judgment obtained by the judgment creditor. The affidavits filed herein and the above factual background did not support the submission that the claimants were in possession of the seized goods. The judgment creditor had to apply for and obtained an order to use reasonable force to enter the premises which was locked and unoccupied (see para 37). The court was unable to find any evidence supporting the claimants' title to the goods seized (see para 40).

(3) The factual background clearly showed that there could be no dispute that the judgment had been legally executed and that there was a complete failure on the part of the claimants to prove title to the goods seized (see para 44).

[**Bahasa Malaysia summary**

Ini adalah rayuan oleh perayu-perayu/pihak-pihak yang menuntut ('pihak yang menuntut tersebut') terhadap keputusan hakim mahkamah sesyen ('hakim pembicaraan') yang menolak tuntutan pihak yang menuntut tersebut dengan kos. Responden ('pemiutang penghakiman') telah mendapat penghakiman terus di bawah A 26A Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR 1980') terhadap defendan ('penghutang penghakiman'). Pemiutang penghakiman telah menyebabkan satu writ penyitaan dan jualan ('WSS') dikeluarkan terhadap penghutang penghakiman untuk menyita harta dalam premis penghutang penghakiman. Pihak yang menuntut menyatakan bahawa ia adalah pemilik semua harta dalam premis penghutang kehakiman. WSS telah dikuatkuasakan oleh seorang bailif mahkamah sesyen Seremban ('bailif itu') selepas mendapat satu perintah mahkamah untuk menggunakan kekerasan munasabah untuk memasuki premis penghutang penghakiman.

Diputuskan, menolak rayuan dengan kos:

(1) Setelah membaca WSS, mahkamah telah membuat satu penemuan bahawa penghutang penghakiman telah membuat satu permohonan untuk menolak WSS atas sebab bahawa penghakiman yang dipertikaikan ditarikhkan sebagai 16 Januari 2002 sedangkan penghakiman sebenarnya didapati oleh pemiutang penghakiman pada 17 Mei 2002. Pada pembicaraan permohonan itu, mahkamah sesyen telah memutuskan bahawa kesilapan tarikh itu adalah 'typograpical' dan oleh itu pemiutang penghakiman dibenarkan menukar tarikh itu kepada 17 Mei 2002 untuk menunjukkan tarikh pemiutang penghakiman mendapat penghakiman itu (lihat perenggan 33).

(2) Pengarah penghutang penghakiman telah cuba dengan sedaya upayanya untuk mengelak daripada membayar penghakiman yang didapati oleh pemiutang penghakiman. Afidavit-afidavit yang difailkan dan fakta-fakta latar belakang tidak menyokong tuntutan bahawa pihak yang menuntut tersebut memiliki harta yang disita. Pemiutang penghakiman terpaksa memohon dan mendapatkan satu perintah untuk menggunakan kekerasan yang munasabah untuk memasuki premis yang telah dikunci dan tidak diduduki (lihat perenggan 37). Mahkamah tidak mendapat sebarang keterangan untuk menyokong hak milik pihak yang menuntut tersebut kepada harta yang telah disita (lihat perenggan 40).

(3) Fakta-fakta latar belakang jelas menunjukkan bahawa tidak ada sebarang bantahan bahawa penghakiman telah dikuatkuasakan secara sah dan terdapat kegagalan yang menyeluruh pihak yang menuntut tersebut membuktikan hak milik harta yang telah disita (lihat perenggan 44).]

Notes

For a case on writ of seizure and sale generally, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) para 3659.

Cases referred to

Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd [1999] 4 MLJ 637 (refd)
Sigma Air Conditioning Sdn Bhd v World Wide Agencies (M) Sdn Bhd [1980] 1 MLJ 179 (refd)
Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd [1998] 1 MLJ 697 (refd)

Legislation referred to

Subordinate Courts Act 1948 s 69
Subordinate Courts Rules 1980 O 26A, O 13 rr 5, 5 (2)(a), O 53 r 11

Appeal from: Execution No 56–37 of 2002 (Sessions Court, Seremban)

Manian Raju (R Jeyanthi & Partners) for the claimants.
SG Gan (Yong & Rakan-Rakan) for the judgment creditor.

Low Hop Bing J:

I Appeal

[1] This is an appeal by the appellants-claimants ('the claimants') against the decision of the learned sessions court judge ('the trial judge') who had on 14 November 2002 dismissed with costs the claimants' claim in Seremban sessions court execution No 56–37 of 2002.

II Factual Background

[2] On 17 May 2002, the respondent ('judgment creditor') had obtained summary judgment under O 26A of the Subordinate Courts Rules 1980 against the defendant ('judgment debtor') vide sessions court Klang Summons No 52–1048 of 2001.

[3] On 26 July 2002, the judgment creditor caused a writ of seizure and sale ('the WSS') to be issued against the judgment debtor to seize the goods in the judgment debtor's premises at Sri Senawang Light Industries Centre, 2136B, Jalan Tampin, Batu 4½, 700450 Seremban ('judgment debtor's premises').

[4] The WSS was executed by the bailiff of the Seremban sessions court ('the bailiff) on 23 August 2002 after obtaining an order of the court to use reasonable force to enter the judgment debtor's premises.

[5] Claimants 1 and 2 had on 27 August 2002 filed the claimants' notices.

[6] Claimant 1 is a director of the judgment debtor and also a brother of claimant 2.

[7] The bailiff then applied for an interpleader's summons which had been fixed for hearing on 6 September 2002, but the trial judge was on medical leave and hearing was postponed to 20 September 2002.

[8] From 27 August 2002 to 20 September 2002, judgment creditor's counsel had written to the claimants' counsel to file affidavit or show documentary evidence in order to prove that the claimants were the owners of the goods seized, but there had been no response from the claimants' counsel.

[9] Meanwhile, the judgment debtor had made an application to the Klang sessions court to set aside the WSS on the ground that it was defective, being allegedly based on a judgment which had not been identified. The Klang sessions court had on 14 September 2002 dismissed that application because the sealed copy of the judgment had been annexed.

[10] The judgment debtor had not appealed against that dismissal.

[11] Until 20 September 2002, about 24 days after the filing of the claimants' notices, the claimants had not filed any affidavit or other documentary proof of their ownership of the goods seized.

[12] The claimants' notices merely stated that the claimants were the owners of all the goods in the judgment debtor's premises and that the judgment debtor was not the owner thereof.

[13] At the hearing of the interpleader's summons on 20 September 2002, the trial judge had repeatedly given the claimants the opportunity to prove ownership of the goods seized but they have failed to do so, as a result of which the trial judge had rejected the submission by claimants' counsel that the seized goods did not belong to the judgment debtor. The trial judge found that the claimants' claim was baseless and dismissed it with costs.

[14] Auction of the seized goods was fixed for 2 October 2002.

[15] On 25 September 2002, claimants 1 and 2 filed a second set of claimants' notices. Meanwhile, claimants 3 and 4 had also filed their respective claimants' notice on the same date.

[16] On 1 October 2002, claimants 1 and 2 affirmed in their affidavit that they were the owners of claimant 4 ie Syarikat Seremban Fire Engineering.

[17] The judgment creditor had on 3 October 2002 filed an application to strike out all the claimants' notices filed on 25 September 2002, on the ground that claimant No 4 had never existed, and this has never been denied by claimants 1 and 2. In the same affidavit, the judgment creditor had also averred that claimant 3 ie Perniagaan Using had never existed. This has never been denied by claimant 3. Claimant 3's manager one Choe Kim Wah affirmed in

his affidavit that the premises which was alleged to be claimant No 3's premises had actually been occupied by other parties since 1995.

[18] In response to a question by the trial judge, the said Choe Kim Wah confirmed that the judgment creditor's affidavit reflected the truth. Consequently, all the claimants' notices were dismissed with costs. Auction was subsequently fixed for 22 November 2002. Meanwhile, claimants' application for a stay of execution was dismissed on 21 November 2002.

[19] Before the actual auction in the morning of 22 November 2002, the judgment debtor through its director attended court in order to satisfy the judgment obtained by the judgment creditor.

[20] In addition to the payment for the costs of the officials and the auctioneer, the judgment debtor has also paid into court a sum of RM43,838.32 in order to obtain a release of the seized goods. That sum represented the judgment sum and incidental costs for execution, including the costs of the dismissal of the judgment debtor's application to set aside the WSS in the Klang sessions court.

[21] Subsequently, counsel for both the judgment creditor and the judgment debtor respectively were directed to appear before the registrar of the sessions court Seremban on 16 December 2002 to verify the costs which should be paid by the judgment debtor to the judgment creditor for the execution, before the said judgment sum was disbursed to the judgment creditor.

[22] After hearing, the registrar fixed the costs of execution at RM4,876.75, against which the judgment debtor had never appealed.

III Alleged Injunction

[23] Mr Maniam Raju learned counsel for the claimants submitted that the trial judge in striking out the claimants' notice, had further ordered that the appellant be restrained from filing further notices and that under s 69 of the Subordinate Courts Act 1948, the sessions court has no power to injunct the claimants from filing their claims afresh.

[24] For the judgment creditor, learned counsel Miss SG Gan, contended that the submission for the claimants regarding the injunction was erroneous as the court has the power to prevent an abuse of the process of the court, relying on *Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd* [1999] 4 MLJ 637.

[25] In my judgment, the true position is to be found by referring O 13 r 5 which expressly provides for the powers of the court hearing an interpleader's summons.

[26] In the instant appeal, as the bailiff is the applicant for the interpleader's summons, the court has acted under O 13 r 5(2)(a) which where relevant reads:

(2) Where:

(a) the applicant on a summons under this order is a bailiff; or

(b) …

(c) …

the court may summarily determine the question at issue between the claimants and make an order accordingly on such terms as may be just.

[27] I am of the view that the trial judge had correctly proceeded to determine the issue under O 13 r 5(2)(a), and dismissed the claimants' notices. On the facts adumbrated above, there is no error on the part of the trial judge in barring the claimants from filing fresh notices.

[28] O53 r11 expressly provides for thte inherent powers of the court to make any order as may be necessary to prevent injustice or an abuse of the process of the court.

[29] As a mater of law, in *Jasa Keramat Sdn Bhd*, Gopal Sri Ram JCA in delivering the judgment of the court said at pp 645I to 646A that the circumstances in which the court's process may be abused are varied and numerous and the categories of such cases are therefore not closed. Whether the institution of an action or its continuation or a step taken therein amounts to an abuse of process, depends upon particular and individual circumstances.

[30] In my view, where as in the instant appeal, the claimants' two sets of notices had been dismissed, the additional order barring the claimants from filing fresh notices has been properly and correctly given by the court as it serves the avowed purpose of preventing an abuse of the process of the court. It is adequately covered by statutory rules and provisions and does not amount to an injunction and certainly does not run counter to s 69 of the Subordinate Courts Act 1948. Most importantly, the principal order of the sessions court dismissing their two sets of claimants' notices is beyond reproach.

IV Writ of Seizure and Sale

[31] It was contended for the claimants that the WSS was bad in law as it was mounted on a judgment dated 16 January 2002 when that judgment had never existed, and that the judgment actually relied upon by the judgment creditor was that dated 17 May 2002.

[32] The stand taken for the judgment creditor is that the WSS was not a nullity and that the issue has been decided on by the Klang sessions court on 14 September 2002.

[33] A perusal of the WSS at pp 1 and 2 of the appeal record leads me to the finding that the judgment debtor had made an application in the Klang sessions court to set aside the WSS on the ground that the impugned judgment was dated 16 January 2002 when the judgment was actually obtained by the

judgment creditor on 17 May 2002. At the hearing of that application on 14 September 2002, the Klang sessions court had ruled that the error in the date was typographical aad so the judgment creditor was allowed to amend the date to 17 May 2002 to reflect the true position as that was the date the judgment was obtained by the judgment creditor, which was so clearly reflected at p 7 of the appeal record.

[34] In the circumstances, the contention for the claimants cannot be sustained.

V Merits of Claimants' Case

[35] It was said for the claimants that the claimants were in possession of the goods seized and so the right to possession or interest in the goods is sufficient to prevent the bailiff from seizing the goods, citing *Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd* [1998] 1 MLJ 697.

[36] The judgment creditor responded that the claimants' claim was baseless as there was no evidence that the claimants were in possession of the goods.

[37] The answer to the above submissions may be established by examining the facts of the case, in which the judgment debtor's directors had made every effort for the sole purpose of evading the satisfaction of the judgment obtained by the judgment creditor. The affidavits filed herein and the above factual background do not support the submission that the claimants were in possession of the seized goods. The judgment creditor had to apply for and obtained an order to use reasonable force to enter the premises which was locked and unoccupied. Hence, the submission for the claimants that the claimants were in possession of the seized goods cannot reflect the true position.

[38] In *Tan Kim Thuan*, *viva voce* evidence at the hearing of the interpleader's summons revealed that the air-conditioner seized was purchased by the claimant but it was fixed in the office of the defendant. In cross-examination, the claimant denied that the air-conditioner belonged to the defendant. The respondent did not call any evidence on this issue. The claimant's claim was dismissed by the sessions court for failure to establish the title to the air-conditioner.

[39] On appeal, the question of law for determination was whether at the healing of an interpleader's summons, the judgment creditor is obliged to give evidence to show that the goods seized are that of the judgment debtor in order to rebut the claimant's case. Augustine Paul JC (now FCJ) held, *inter alia*, that the claimant hitos to show that he has a title to the goods which justifies his intervention, and such onus can only be satisfied by proof of actual title in himself. The claimant's appeal was dismissed.

[40] Reverting to the facts before me, I am also unable to find any evidence supporting the claimants' title to the goods seized. I am of the view that *Tan Kim Thuan* cited for the claimants herein actually militates against the contention of the claimants. See also *Sigma Air Conditioning Sdn Bhd v World Wide Agencies (M) Sdn Bhd* [1980] 1 MLJ 179 at p 181 per Mohd Azmi J (later FCJ).

VI Trial of an Interpleader Issue

[41] It was stressed for the claimants that the interpleader issue should be tried where the value of the goods is considerable or there is a serious dispute of fact.

[42] The view taken for the judgment creditor is that the claimants had failed to give evidence to prove title to the goods seized.

[43] In my view, the short answer to the claimants' contention is that this is an increasingly feeble and futile attempt on the part of the claimants to frustrate the judgment creditor from harvesting the fruits of the judgment, when there is no tirace of any merits to sustain that contention.

[44] The above factual background clewrly shows that there can be no dispute that the judgment has been legally executed and that there was a complete failure on the part of the claimants to prove title to the goods seized.

VII Conclusion

[45] This appeal being wholly without merits is hereby dismissed with costs. I therefore affirm the decision of the trial judge.

Appeal dismissed.

Reported by Peter Ling